July 25, 2001

Ms. Holly Pugliese
Certification and Compliance Division
U.S. Environmental Protection Agency
2000 Traverwood
Ann Arbor, MI 48105

Subject: On-Board Diagnostic Service Information

Dear Ms. Pugliese:

The Alliance of Automobile Manufacturers (Alliance) and Association of International Automobile Manufacturers represent nearly all car and light-truck manufacturers in the United States. Over the last two years, we have worked with the Environmental Protection Agency (EPA), California Air Resources Board (ARB), diagnostic tool manufacturers, and repair shops to ensure technicians receive the tools and information they need to swiftly and accurately repair vehicles.

While the Alliance and AIAM understand the need for regulations to ensure uniform participation by all stakeholders, we were very disappointed to find that two years of cooperative work with EPA resulted in virtually no noticeable resolution of the problems we identified. In fact, some of these issues are now more onerous and rigid than when we began discussions with EPA. The regulations in the Notice of Proposed Rulemaking are overly prescriptive, inflexible, potentially self-defeating, and may, in some cases, jeopardize proprietary information. Furthermore, EPA has exceeded the authority granted under the Clean Air Act (CAA or the Act) with a number of the proposed requirements.

Here are a few examples.

1. The NPRM contains 17 detailed reporting requirements. We believe these criteria are excessive. However, even if appropriate, placing them in the regulation, where any change would require a lengthy rulemaking process, would not be appropriate.

2. The NPRM would require automakers to tape all training classes, wasting valuable resources to annually produce thousands of hours of video tape that will never be viewed.

3. The proposed regulations would require manufacturers to provide "component operating ranges" (Section (g)(2)(ii)(E)(ii) and (g)(5)(ii)), this is not only a vast quantity of information but also, in some cases, proprietary information.

The Alliance and AIAM believe the intent of the regulation and the intent of Section 202 (m)(5) of the Act is to ensure a level playing field between franchised new car automobile dealers and repair shops. Automakers have agreed to this principle and have

worked together with repair shops in Arizona (under the Arizona Pilot Program) and nationally (under the National Automotive Service Task Force) to ensure the information and tools are available to all technicians. Manufacturers believe this is in the best interest of the customers shared by all.

However, the NPRM goes far beyond simply ensuring a level playing field for those involved in vehicle repair. The NPRM attempts to assist and improve the profits of multi-billion dollar diagnostic tool manufacturers, third-party training organizations, and third-party service information providers. Enhancing the profitability of these additional organizations by forcing automakers to provide information, service, or training information in special formats, is entirely inappropriate and well beyond the scope of the authority granted EPA in the Act. These businesses should compete for customers just as automakers must compete. Where appropriate and mutually beneficial, they should enter into agreements with automakers – agreements that are entered into freely by both parties. Automakers uniformly oppose requirements proposed that would, at the same time, enhance the profitability of third-parties and restrict profitability by automakers or the dealers.

We offer the enclosed comments in the hope that we can resolve these issues and move on to providing service information in a readily accessible format to repair technicians. Please note that references to "Section (g)" refer to Section 86.094-38(g), and also are intended to refer to the relevant portions of Section 86.1808-01(f), which is identical to Section 86.094-38(g).

It is the automakers' intent to provide service technicians the tools and information they need to swiftly and accurately repair vehicles, which is in the best interest of automakers, service technicians, our shared customers and clean air. We look forward to working with EPA and technicians to resolve the issues listed above. Please feel free to contact us if you have any questions or need additional information.

Sincerely,

Steven Douglas
Alliance

for John Cabaniss
AIAM

Enclosure

cc: Greg Green
Allen Lyons, ARB

Enclosure to Alliance & AIAM Letter of July 25, 2001

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1. **Downloading Information from the Web Site (Preamble)**

Item number 6 of the Preamble, Accessibility and Performance Requirements, includes the following statement after each of the proposed subscription options, "*...including the ability to purchase, download and/or print the information...*"

One of the most important advantages for information availability on the web is access to the most up-to-date information available. Dissemination of the information via the web makes it possible to correct and add to the information on a continuous basis. It is important for the user to not think of the information as something to store either in paper or on disk. The idea is to go to the web site for the information.

The main objective is the ability to view the information and print what they may need at that time. Therefore, ***we recommend that the final regulation clarify that access to information means the ability to purchase, view and print the information. No mention of downloading is necessary.***

In addition, EPA must allow manufacturers to deter piracy and protect the integrity of information in the field. Therefore, protection against unauthorized downloading must be allowed.

2. **Maintenance Instructions (Section (g)(2)(i))**

Sections 86.096-38(g)(2)(i) and 86-1808-01(f)(2)(i) state:

> *Vehicle manufacturers shall furnish or cause to be furnished ... including but not limited to service manuals ... data stream information, bi-directional control information, and ...This requirement applies to 1996 and later model year vehicles.*

Data stream and bi-directional control information should be deleted from Sections 86.096-38(g)(2)(i) and 86-1808-01(f)(2)(i). These referenced sections contain the list of information that manufacturers must provide to service technicians; however, data stream and bi-directional control information are used by equipment and tool companies who design and manufacturer diagnostic scan tools, not by service technicians. This information is appropriately included in Sections 86.096-38(g)(12) and 86-1808-01(f)(12) which define information that must be made available to equipment and tool manufacturers.

Section 86.096-38(g)(12) states:

> *By [date 30 days after the effective date of the final rule], ... vehicle manufacturers shall make available to equipment and tool companies all generic and enhanced service information including bi-directional control and data stream information ...This requirement **applies for 1996 and later** model year vehicles. [emphasis added]*

While Section 86-1808-01(f)(12) states:

> *By [date 30 days after the effective date of the final rule], ... vehicle manufacturers shall make available to equipment and tool companies all generic and enhanced service information including bi-directional control and data stream information ... This requirement* ***applies for 2001 and later*** *model year vehicles. [emphasis added]*

Section 86.096-38(g)(12) applies to 1996 and later model year vehicles while Section 86-1808-01(f)(12) applies to 2001 and later model year vehicles. These sections should apply to the same model year, and the regulatory proposal appears to be in error. ***The Alliance and AIAM strongly recommend that this requirement apply to 2001 and later model years for those manufacturers that have already provided this information for prior years (i.e., 1994 and later model years) under one of two currently allow alternatives required by Section 86.094(g)(10 through 12).***

3. Generic Drive Cycle – Section (g)(2)(ii)(E)(ii) & (g)(5)(ii)

The specified sections require original equipment manufacturers (OEMs) to provide, among other things, "OBD generic drive cycle information." This term is not defined in the regulation. In past discussions with EPA, OEMs have agreed to provide a drive cycle for each major monitor. This would allow a technician to ensure a repair was satisfactory by operating the vehicle over the specified cycle. If a technician wanted to ensure all of the monitors operated, she or he would have to operate the vehicle over all of the cycles. Also note, that the monitor specific drive cycles may either be in form of traces or in written form listing the monitoring conditions.

The Alliance and AIAM recommend EPA 1) revise the wording of this requirement to read "monitor-specific generic drive cycle" or words to that effect, and 2) include a discussion of this issue in the preamble.

Automakers remain concerned about the possibility of operating the vehicle unsafely when attempting to ensure the monitor operates. Obviously, safety is of primary and paramount concern when operating a vehicle.

4. OBD System Operational Information (Section (g)(2)(ii)(E)(ii))

EPA has proposed to require that manufacturers compile and make available OBD system operational information including, but not limited to component operating ranges and system logic flow diagrams. EPA justifies this proposal in the NPRM by citing unnamed service technicians who claimed that some manufacturers' service information was not adequate for them to make emissions related repairs. The Alliance and AIAM disagree with this assessment and certain aspects of EPA's proposal for the following reasons:

- EPA's claims are completely unsubstantiated by any evidence. EPA provided no evidence or proof in the NPRM that manufacturers' current service information is inadequate. In fact, manufacturers have a huge motivation to ensure that their service literature is adequate, and devote a tremendous amount of time and effort to develop diagnostic procedures that can easily be followed and understood by all service technicians, both from dealerships and the aftermarket.

- The CAA does not give EPA the authority to dictate the content of manufacturers' service information. The CAA requires that manufacturers provide "any and all information" needed to make use of the OBD system. Manufacturers provide all the information that is made available to dealerships, and that information is structured in a manner to lead the service technician through an organized step-by-step procedure designed to pinpoint the malfunction and correct it. For some diagnostic procedures, it is not necessary for the service technician to have certain information, such as a specific component operating range, in order to complete the diagnosis and repair. To suggest, as EPA has, that the additional information is absolutely needed in order to make use of the OBD system, and thus is justified by the statute, is simply incorrect.

- EPA does not indicate the purpose for requiring every component operating range to be made available. As explained above, this information is not needed in all cases to make emissions-related repairs. Also, providing this information would be a huge task for manufacturers, assuming that this information would be required for every component on the engine and transmission.

- Some manufacturers consider OBD II system logic flow diagrams to be proprietary information because they replicate the specific algorithm that a manufacturer has developed for a particular diagnostic. Logic flow diagrams are typically provided to programmers, which in turn are developed into software code. This information may have been developed as the result of a manufacturer investing a significant amount of resources in engineering and testing. EPA is prohibited from requiring this information, since it would violate the CAA allowance that a manufacturer's proprietary information need not be made available, provided it is not made available to franchised dealerships.

- In the recent service information rulemaking in California, ARB proposed that manufacturers make available a general description of their OBD II systems, including a general description of the operation of each monitor and the parameters that are being monitored; diagnostic codes associated with each monitor; typical enable conditions for the monitors; a general sequence of events, execution frequency and duration; and typical malfunction thresholds. From this information, service technicians should easily be able to understand and make use of a manufacturer's OBD system. We support ARB's proposal. There is no need for EPA to require additional information, such as logic flow diagrams or component operating ranges, beyond what ARB has proposed to require.

In summary, EPA has provided no evidence to justify the need for the additional information proposed in the NPRM. Moreover, EPA does not have the authority under the CAA to require manufacturers to make it available, unless a manufacturer is already making that information available to their franchised dealerships.

The Alliance and AIAM recommend that EPA adopt requirements consistent with those proposed by ARB, and simply require manufacturers to make available the general OBD II system description information as described above.

5. Availability of Diagnostic Trouble Trees (Sections (g)(2)(ii)(E)(iii) and (g)(5)(iii))

The NPRM states in two places ((g)(2)(ii)(E)(iii) and (g)(5)(iii)) that manufacturers must post to their web site emissions-related diagnostic procedures (a.k.a. "fault trees"), and they may not require connection to a vehicle to access those procedures. Some manufacturers do just that, with automated dealer tools. The new rule would require those procedures be converted to another format and be made available for display on (or ordering from) the manufacturer-specific web site. This would allow technicians to review and study fault trees without actually having a car on hand to diagnose. The Alliance and AIAM agree that the aftermarket should have access to diagnostic procedures, but we do not believe profit-motivated shops would waste time diagnosing problems in absentee vehicles, since few customers would pay them for it. Automakers believe aftermarket shops prefer diagnostic tools and procedures that save time, thus improving profit.

The Alliance and AIAM would like to point out that providing the information in this format is not extraordinarily burdensome to its member companies who have not already done so. Just the same, some procedures are indeed extremely complex. We wonder if this is really a beneficial way for us to spend our resources. And we question why any technician would prefer to spend the time (possibly hours) necessary to carry out these procedures manually, especially if an automated method were available.

Considering the above, ***we recommend that EPA:***

- ***Scan tool connection to vehicle***: Delete the prohibition against requiring the scan tool to be connected to the vehicle. It simply makes sense to require that the scan tool is connected to the vehicle. Manufacturers use the scan tool to collect and assess information from the vehicle and thus aid and improve the diagnostic. The technique assures faster and more reliable results. Furthermore, technicians cannot read diagnostic trouble trees with a scan tool. If adopted, this provision would limit the diagnostic potential of the scan tool and provide no benefit to the technician.

- ***Make available written copies of diagnostic trouble trees***: For those manufacturers requiring connection to the vehicle to access diagnostic procedures and not otherwise publishing alternate diagnostic procedures using

only a generic scan tool, we suggest that a better alternative is to provide aftermarket tool companies the information needed to incorporate the diagnostic trouble trees into aftermarket tools. We firmly believe that using the scan tools to diagnose vehicles and including the trouble shooting on the scan tool itself enables superior vehicle diagnosis and repair. Thus, whether in an OEM scan tool or an aftermarket scan tool, the technician would benefit from this proposal as an alternative to providing written (web page or otherwise) copies, which would require significant resources to compile.

6. **Lead-Time (Section (g)(3))**

EPA has spent almost two years drafting and reviewing this NPRM. Even though automakers, service technicians, and other effected parties tend to agree with EPA's intentions (i.e., Internet access to service information, pass-through reprogramming, and OEM diagnostic tool plus information to tool companies), the length of time spent drafting the regulation speaks to the complexity of issues addressed. Because of the complexity of the regulation and uncertainty about its contents, automakers would be remiss to attempt to implement the requirements of a regulation so complex that it required two years to draft and review. And while automakers agree with most of the proposed requirements and will begin implementing them as soon as the regulation is finalized, the six months allowed for full implementation is simply not sufficient.

This regulation and the products from it (e.g., Internet access to service information, pass-through reprogramming, and greater tool availability) will hopefully be used by technicians for decades to come. Thus, the Alliance and AIAM believe that it is more important to ensure proper implementation rather than rapid implementation. Consequently, ***we propose that EPA allow one year from the final rule to implement the regulation.*** This timing will allow manufacturers minimal lead-time to implement the sweeping changes proposed. We would welcome the opportunity to work with EPA if there are areas that can be implemented earlier.

7. **Information Dissemination – Flexibility (Section (g)(3))**

With respect to the proposed mandatory subscription structure, the preamble states (issue 6, Accessibility and Performance Requirements):

"... We propose that these options include, but not be limited to short-term, mid-term, and long-term access to the required information...

We believe that establishing this tiered approach will serve as a reference point for manufacturers to develop and implement access to their Web sites that allow maximum flexibility for aftermarket service providers, and others who engage in the service and diagnosis of vehicles given the varying needs for access to manufacturer specific information. ... To this extent, we request comment on this proposed tiered structure... ."

The Alliance and AIAM understand the goal of this regulation and proposed structure is to meet the needs of a variety of potential users of the web site. ***However we request that the following additional statement be included: "In lieu of meeting the requirements of this section, the manufacturer can request the Administrator to approve an alternative method by which the information can be accessed."***

This important addition would allow for innovation and flexibility while continuing to meet the intent of the regulation and retaining the reference point for developing access options for the Web sites.

8. Information Dissemination – Cost (Section g(3)(iv))

The Notice of Proposed Rulemaking's preamble states, "[W]e required manufacturers to make emission-related service information available at a reasonable cost. Reasonable cost was described as a fair and reasonable price taking into consideration factors such as cost to the manufacturer of preparing and/or providing the information, the type of information, the format in which it is provided, the price charged by other manufacturers for similar information, the differences that may exist among manufacturers (e.g., the size of the manufacturer), the quantity of material contained in a publication, the detail of the information, the cost of the information prior to finalization of the 1995 rule, volume discounts and inflation." 66 Fed. Reg. 30,830, 30,842 (June 8, 2001). *See also* proposed 40 C.F.R. § 86.096-38(g)(6)

Yet, the actual rules go well beyond specifying factors to be considered in terms of pricing for Internet access and exceed the Agency's authority under the Clean Air Act ("CAA"). *See* Proposed 40 C.F.R. § 86.096-38(g)(3)(iv); *see also id.* § 86.1808-01(f)(3)(iv). The provisions in question cap short-term access charges (i.e., daily access) at $20, mid-term (monthly) access charges at $300, and long-term (annual) access charges at $2,500.

This proposal overlooks the fact that federal intellectual property laws protect some of the documents covered by EPA's regulations. For example, EPA compels manuals (without regard to whether they are copyrighted) to be "posted" to each manufacturer's web site. *See* proposed 40 C.F.R. § 86.1808-01(f)(5)(i). Accordingly, the proposal to mandate disclosure of these manuals must be reconciled with federal law, especially the Copyright Act. *See Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, 521 (2d Cir.) (forced disclosure of copyrighted MCAT questions implicated Copyright Act preemption), *cert. denied*, 502 U.S. 862 (1991). Unless the EPA can show that the Congress intended that the Copyright Act not trump its CAA regulations (which will be difficult given that the source of EPA's authority here, CAA § 205(m), specifically adverts to the need to protect manufacturer intellectual property in the form of trade secrets), the Agency is not authorized to compel mandatory disclosures of copyrighted materials. *See U.S. Chamber of Commerce v. Reich*, 83 F.3d 439, 441 (D.C. Cir. 1996) (applying preemption analysis to the reconciliation of statutory conflicts).

The proposed pricing regulations also overstep EPA's statutory authority under the Clean Air Act. In particular, the proposal appears to overlook the *tertiary* nature of the issues addressed in this rulemaking. EPA's *primary* responsibility in this area is to set mobile-source emissions standards. *See generally* CAA § 202. The Agency's *secondary* authority is to require the use of onboard-diagnostic systems that ensure that in-use emissions standards are adhered to and that deviations from those standards are detected. *See generally* CAA § 202(m). It is only as a *tertiary* matter that is EPA given authority to ensure that the information necessary for repair of OBD systems is made widely available. *See generally* CAA § 202(m)(5).

Only by keeping this structure firmly in mind can EPA appropriately discharge the authority that Congress has in fact conferred on the Agency. Service-information disclosure is not an end in itself, but rather a means to the end of keeping OBD systems in good repair, which is in turn a means to the primary end of keeping vehicles operating in compliance with in-use emissions standards. Even assuming *arguendo* that EPA has authority to compel informational disclosures, the proposal to rigidly compensate manufacturers for disclosed information would, as a practical matter, undermine the purposes of the CAA. In particular, if manufacturers are unable to obtain reasonable, flexible compensation for the information they provide, they will have fewer incentives and diminished ability to provide the timely, detailed, user-friendly service information that users of such information desire. These diminished incentives and practical abilities must sooner or later translate into the frustration of the Act's more important goal of maintaining compliance with in-use emissions standards.

Perhaps most importantly, EPA's proposed regulations neglect to identify a source of statutory authority to set prices in the first place. EPA's statutory mandate is to "require . . . manufacturers to provide promptly to any person engaged in the repairing or serving of motor vehicles or motor vehicle engines" certain types of information. CAA § 202(m)(5). This mandate cannot plausibly be extended to encompass a grant of price-setting authority to the EPA. *See Municipal Intervenors Group v. FPC*, 473 F.2d 84, 89 (D.C. Cir. 1972) (refusing to read Price Commission regulations as constituting a delegation of price-setting authority to the FPC absent an indication of an intention to delegate such authority).

Indeed, section 202(m)(5) does not even mention prices, let alone confer price-setting authority in express terms. Most price-setting occurs either under broad delegations of authority clearly intended to include price-setting (e.g., under "public interest" standards) or under *specific* delegations of price-setting authority (*e.g.*, the grant of authority in 12 U.S.C. § 1904 note to the Cost of Living Council in *Pacific Meat Jobbers Ass'n v. Cost of Living Council*, 481 F.2d 1388 (Temp. Emer. Ct. App. 1973)). Here, however, the statutory delegation to EPA is targeted and narrow, but devoid of specific mention of power to set prices. We know of no statute that the D.C. Circuit has ever held to include an *implicit* granting of price-setting authority under such circumstances.

Nor is there any statutory ambiguity that might constitute an implicit delegation of such authority. Analysis of statutory structure is one important aspect of the statutory analysis taking into account "traditional tools of statutory construction" at the level of *Chevron* "Step One." *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) ("step one" takes into account "traditional tools of statutory construction"). Here, structural analysis of section 202(m)(5) indicates that, by creating an obligation for manufacturers to provide "promptly" to the aftermarket the same information provided to a manufacturer's dealers, Congress was expressing the intention *not* to delegate broad price-setting authority. That is, the statute could *at most* be read as a grant of authority to EPA to prohibit price *discrimination* in favor of franchised dealers and against aftermarket service providers. It can in no way be read to grant power to regulate the prices at which information is provided to both aftermarket providers *and* dealers.

Instead of faithfully implementing the underlying statute, the pricing proposal appears simply to follow California's lead. Because of California's exemption from the mobile-source preemption provision in CAA § 209(a), it often adopts unique emissions regulations. In this case, the California Legislature explicitly delegated some price-setting authority to the California Air Resources Board ("CARB") in a bill specifically targeting service information for a new type of regulation. Because no analogous congressional authority exists here, however, EPA cannot simply follow ARB's lead and attempt to federalize a new California approach, as it often does (and is authorized to do) in other contexts.

In addition, these pricing caps suggest a foresight on the Agency's part that exceeds that of even the most savvy Internet professionals and businesspeople. As the recent experience in the hi-tech sector of the economy indicates, it is not easy to predict the profitability of Internet ventures. Nevertheless, EPA presumes to know, on the basis of very little data and analysis, that the price caps that it has set in the Internet realm are "fair and reasonable."

Without supporting data, which EPA has not yet provided, it would be arbitrary and capricious to set price caps of this nature (even assuming the EPA had been delegated the authority to do so), especially after recognizing the large number of factors that must be addressed, plus any other factors the market makes relevant. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Also, it is undeniable that it would be arbitrary and capricious for the EPA to ignore the takings aspects of a regulatory program. *See National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988). In particular, it is axiomatic that the rates regulated entities are permitted to charge must be sufficient to cover their costs, plus a reasonable rate of return on capital invested. *See FPC v. Hope Natural Gas*, 320 U.S. 591 (1944).

Jersey Central Power & Light Company v. FERC illustrates this point. *See* 810 F.2d 1168 (D.C. Cir. 1987) (en banc). In that case, the *en banc* D.C. Circuit confronted a claim by an electric utility that FERC's refusal to account properly for the costs of a failed nuclear construction project produced an unconstitutional and confiscatory rate. The court held that the utility was entitled to an evidentiary hearing because it raised a valid issue as to whether FERC's rates were unjust or unreasonable. The court also established that it is not sufficient for an agency to lay out reasonable factors for use in setting rates, as EPA has done here. Rather, the agency must also apply those factors in a way that adds up to a reasonable end result.

In this case, the price caps EPA sets (1) are not within EPA's general authority under the CAA; (2) are not just and reasonable as general rule; (3) have not been established after opportunity for the sort of evidentiary submissions that *Jersey Central* requires; and (4) do not reflect the non-arbitrary application of the factors that EPA proposes to consider.

Perhaps significantly, Supreme Court Takings doctrine establishes that it is not permissible for EPA to attempt to argue that manufacturer profits in other areas of regulated or unregulated business can make up for any losses it might impose in the service-information context. A business "cannot be compelled to carry on even a branch of business at a loss." *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920) (Holmes, J.).

Finally, EPA has changed course here from its approach under the 1995 rules. It is a mainstay of administrative law that EPA must justify this change under a heightened rationality requirement. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *Teamsters Local Union Nos. 822 & 592 v. NLRB*, 956 F.2d 317, 320 (D.C. Cir. 1992); *AFL-CIO v. Block*, 835 F.2d 912, 919-20 (D.C. Cir. 1987); *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883-84 (D.C. Cir. 1987) ("The record is virtually barren of reasons for this *volte face*.").

EPA says with regard to its change in course, "[W]e believe it is necessary to revisit the issue of cost of service information and diagnostic scan tools and the Agency's position on this issue." 66 Fed. Reg. at 30,842. EPA also goes on to say that "full-text access to information via the Internet introduces additional parameters that must be evaluated in order to ensure that the information required by these regulations can be considered available." *Id.* The Alliance and AIAM agree, of course, that certain new considerations are presented by the arrival of the Internet. But the Internet's arrival and the *addition* of these further considerations do not in themselves establish that it is appropriate to introduce price caps in this emerging arena of great complexity, great uncertainty, and fast-paced change. To the contrary, as pointed out above, the realities of the Internet economy suggest that a price-cap approach will be exceedingly difficult to manage and ultimately counterproductive.

9. Search by VIN (Section (g)(3)(v)):

This section requires OEMs to provide search capability on their web sites. Automobile manufacturers intend to ensure that information is readily available as quickly as possible to the individual users. However, the proposal to search by VIN will inflate cost without providing a meaningful improvement in accessibility. The websites will be designed for use by repair technicians who are both computer literate and knowledgeable on the information they are seeking. Thus, a requirement to provide for searches using VIN is unnecessary. Clearly if the VIN is available, the model and year information is available and could be just as effectively used for searching. The additional search criteria, while not improving the site for repair technicians, would add cost and increase the price to the end user.

Historical and customary practice is to search for information by make, model and year with further refinement by options where necessary (i.e. engine/trans and etc.). Although there are a few items that can (and will likely) be searched by VIN, i.e. service campaigns and vehicle calibrations for some manufacturers, the vast majority of service information has never been searched for by VIN and there is no need to have this capability to swiftly find what a technician needs. Some information is naturally searched for by VIN and some OEMs already use these search criteria where it makes sense. However, a great deal of service information, for example Repair Manuals and Electrical Wiring Diagrams, has never been searched for by VIN and there is no existing practice or practical reason to search using these criteria. And in no way should a search by VIN be mandated by EPA.

We recommend deleting this requirement.

10. Vehicle Security System (Section (g)(5)(vi))

This section requires web sites to include "Information needed to start the vehicle when the vehicle is equipped with an anti-theft system or other systems that disables the engine and prevents it from starting after the completion of an emissions-related repair." Automakers recognize the need to be able to start a vehicle after an emissions-related repair. However, we have concerns with this section.

First, the availability of specific information required to enable this procedure. Some anti-theft systems require serial data messages to be sent to the vehicle on the OBD data link that contain a PIN or key that is unique to each specific vehicle. This vehicle specific code may be obtained from information that should be retained by the vehicle owner, or may need to be obtained from an assistance center controlled by the vehicle manufacturer. We assume that the vehicle specific access codes would not be required to be available on the web site, but that the web site would be required to inform the service technician of how to obtain that code. Enhanced data stream information that will be available to scan tool manufacturers would allow an aftermarket scan tool to be used to enable the vehicle to be started, assuming the code

is available through some other means. Automakers would appreciate clarification if this assumption is incorrect and a brief explanation in the preamble if it is correct.

Second, current vehicle security systems comply with a number of requirements both in the United States (e.g., NHTSA) and internationally (e.g., Anti-Car Theft Act of 1992, 95/56/EC, Thatcham Issue 3a). For some manufacturers, implementing this requirement and maintaining compliance with U.S. and international requirements will require redesigning the vehicle's anti-theft system, which will require appropriate lead-time.

Consequently, ***we recommend implementing this requirement in the 2007 model year.*** We are still investigating this issue and may have further remarks in subsequent written comments. It is worthwhile to note that many manufacturers already comply with this requirement and those who do not will phase in the requirement prior to the 2007 model year for a significant portion of their vehicles. However, the 2007 full implementation allows sufficient time for those manufacturers to implement changes without jeopardizing vehicle security or compliance with other regulations.

11. <u>Third-Party Information Providers (Section (g)(8)), Training Providers (Section (g)(9)(iii))</u>

These sections require OEMs to provide the required emissions service information, and training materials to third-parties in electronic format (either CD-ROM or diskette) or indirectly via a special website. The benefits of these requirements go solely to improve the profitability of third-parties – many of which, as stated earlier are multi-billion dollar corporations. The Act does not grant EPA the authority to dictate practices of this nature between business entities.

In this NPRM, EPA has gone to great lengths to ensure technicians have ready and rapid access to OEM service information directly from the OEMs. The Alliance and AIAM support this. However, we strongly oppose provisions that require OEMs to provide information to third-parties. By allowing third-parties to demand information from OEMs without entering into a freely-negotiated agreement with the OEMs, a practice common today, the regulation amounts to compulsory license to third-parties. Furthermore, the "reasonable price" provisions in the proposed regulation would apply to this third-party transaction even though the reasonable price definition was specifically tailored for repair shops.

Finally, most of the information EPA would require to be disclosed is protected under the copyright laws. EPA's requirement that manufacturers make this information available to third-parties limits the manufacturers' ability to protect its copyrighted information.

The Alliance and AIAM strongly oppose these provisions and request EPA to delete them from the regulation. This provision only adds additional complexity and

compliance burdens on the OEM that will drive up the cost of the information to the end user.

12. Video Taping of Manufacturers' Training Classes (Section (g)(9)(ii))

EPA proposed that manufacturers be required to tape or duplicate any emissions-related classroom training courses provided to dealership service technicians, and make those tapes available to the aftermarket. The Alliance and AIAM believe that this requirement would not be practical for either manufacturers or aftermarket service technicians for a number of reasons:

- It would require that manufacturers purchase the services of a professional production company at a significant cost. Those costs would need to be passed-on through the cost of the videotapes.

- It is not likely that anyone would purchase these tapes. Imagine a garage paying their service technician to sit in front of a television set all day and watch an eight-hour training class. The alternative and equally unlikely scenario would require service technicians to watch these tapes on their own time.

- Some manufacturers only provide hands-on skills-based training for their classroom training. For example, Ford provides knowledge-based training through an interactive CD ROM curriculum. Technicians may take on-site skills-based training only after they have successfully completed the knowledge-based CD ROM training. It simply wouldn't provide any benefit for aftermarket technicians to watch a videotape of a skills-based class, especially if they chose not to purchase the knowledge-based CD ROM training courses.

The Alliance and AIAM member companies are willing to make available training materials, CD ROM training courses, and videotaped broadcasts of instructional sessions made available to dealership technicians via satellite or other broadcast media. However, videotaping classroom training would not be practical for manufacturers or useful for service technicians.

For training, the auto industry believes that all technicians should have access to training that is equivalent to the factory training provided to dealership technicians. However, auto manufacturers are simply not in a position to provide such training directly to the aftermarket industry. For such training, there is an ample network of existing training providers nationwide through local community colleges and technical schools.

Automakers believe that a better alternative to thousands of hours of unwatched video tapes is to use the existing community college infrastructure to train repair technicians. Automakers are working through the NASTF Training Subcommittee to develop a pilot program using select community colleges to train independent repair technicians. We would be happy to discuss this in greater detail with EPA. However,

we must oppose the requirement for manufacturers to videotape on-site training classes.

13. Timeliness of Information (Section (g)(10))

This section would require manufacturers to make available the required information within three months of model introduction. The Alliance and AIAM recommend revising this paragraph to require manufacturers to make available the service information for a vehicle within 180 days from the date the information is delivered to dealerships, or as allowed by the Administrator. ***We recommend this change for two reasons.***

First, vehicles are virtually never repaired outside of a dealership within the first year of the vehicle life. This change would provide the information within 180 days of providing it to the dealer. Consequently, the additional time should not adversely impact repair facilities. Second, the additional time can be very useful to a manufacturer since the information is sometimes in a different format when it is delivered to dealerships (e.g., when delivered via satellite downlink). Thus, the information may need to be revised before being put on the Internet.

14. Reprogramming of Pre-2003 Model Year Vehicles(Section (g)(11))

For Model Years prior to 2003, paragraph (vii) requires OEMs to either meet the SAE J2534 requirement or to make available to aftermarket scan tool manufacturers specified information necessary to incorporate reprogramming capability into aftermarket tools. This requirement combined with the requirement in paragraph (i) of this section, would significantly increase the risk of vehicle calibration/emissions tampering. Furthermore, it would be difficult, if not impossible, to reconstruct some of the software specifications for legacy systems. Finally, the current service information regulation already requires OEMs to make available reprogramming for reprogrammable vehicles. Our experience to date has shown very limited demand for reprogramming because the overwhelming number of reprogramming requirements occurs during the first year of the vehicle's life – a time when most service is performed under warranty. For these reasons, ***we recommend eliminating Sections (g)(11)(vii).***

Paragraph (ii) of this section makes OEMs responsible for ensuring franchised new car dealers provide reprogramming services "at a fair and reasonable cost and in a timely manner." The regulation does not specify the meaning of the quoted passage (i.e., "fair and reasonable cost" or "timely manner"). Furthermore, the regulation does not specify the authority drawn upon to assign responsibility to OEMs for business transactions between two other organizations. EPA does not have the authority under the CAA to adopt this requirement and it should be deleted.

15. SAE J2534 Pass-Through Reprogramming Requirement (Section (g)(11)(vii))

EPA proposed to require that all 2003 and later OBD vehicles equipped with reprogramming capability comply with the SAE J2534 pass-through reprogramming specifications. Manufacturers will need additional lead-time to comply with this new requirement. The additional time is needed for several reasons:

First, the SAE specification is not yet completed. Although a draft is available, final engineering demonstrations and calibration programming would not be possible until the final specification is made available. Second, time is also needed in order to develop the calibration CD or other media which will function with the pass-thru reprogramming tool. Even though this is not software on the vehicle, it requires time for development and testing.

Although the pass-thru technique has been discussed for some time, software development programs do not often get approved based on draft versions of specifications. Engineering evaluations are made, however the testing needed to ensure the systems work in the field is done after the targets are clear.

The lack of a final SAE specification and the limited or lack of access to prototype pass-thru tools make it impossible to make final testing on MY03 vehicles and to completely assess and account for the variability of prototype tools. ***Therefore, it is requested that this requirement be effective for MY04 to allow time to resolve any unexpected issues.*** This is consistent with ARB's proposed service information regulation.

16. Data Stream Information (Section (g)(12))

Section (g)(12) requires service information, including data stream information as defined in (g)(2)(ii)(C), to be made available to scan tool manufacturers. The definition of data stream information includes the words "information ... for use by other modules ... to conduct normal vehicle operation or for use by diagnostic tools." Vehicle manufacturers agree that data stream information required for diagnostic purposes is necessary for tool manufacturers to build diagnostic tools for the aftermarket repair industry, but do not believe that data stream information intended for normal operation of the vehicle should be required to be made available. Data values used for normal operation are included in messages used for diagnostics when necessary, but scaling may be different and the data may be combined differently with other data values. The diagnostic data values are provided in more standardized messages and are sufficient for diagnosis and repair.

The Alliance and AIAM request clarification that only data stream information required for diagnostic purposes, and not the redundant data stream information used for normal operation, be made available to tool manufacturers.

17. Aftermarket Tool Manufacturers (Section (g)(12)(i))

The Alliance and AIAM strongly oppose any requirement to deliver information in any specified format (i.e., electronic) or the establishment of a special website for the sole benefit of third parties other than the service technicians. Again, the only benefit of providing information in this fashion is to 1) support ETI and 2) improve profits for third party tool providers. It is patently unfair and unreasonable to require one industry to expend resources to improve the profits of another industry. While many manufacturers use ETI as a central clearinghouse to manage and distribute large volumes of complex data, this should not be a requirement. (The regulation does not specify ETI, however, this requirement was clearly written with ETI's TEK-NET library in mind.) We agree with the proposal to provide the information in English. However, ***we oppose the other provisions designed to improve tool company profits, and recommend EPA delete them from the proposed regulation.*** Additionally, it is beyond EPA's authority in the Act to dictate practices of this nature between business entities.

18. High Speed CAN (Section (g)(16)(ii))

In section (g)(16)(ii), EPA proposes to require vehicle manufacturers to comply with SAE Recommended Practice J2284, "High Speed CAN (HSC) for Vehicle Applications at 500 KBPS" beginning with Model Year 2003. Note that this reference should be changed to ISO 15765-4. Nonetheless, the Alliance and AIAM have several concerns with this proposed requirement.

First, this is a vehicle requirement and does not belong under reference materials and maintenance instructions in a service information rulemaking. Second, switching to the J2284 HSC protocol requires major computer hardware changes which could not possibly be implemented on all applications by the 2003 model year. Finally, this requirement is unnecessary, since manufacturers are generally planning to switch over to this communication protocol in the future and the ARB is going to require its use in its revised OBD II requirements by the 2008 model year and allow its use beginning in the 2003 model year.

We recommend deleting this section from Service Information regulation.

19. SAE Recommended Practices (Section (g)(16)(iii))

Sections 86.096-28(g)(16)(iii) and 86.1808-01(f)(16)(iii) state:

> For pass-through reprogramming capabilities, vehicle manufacturers shall comply with SAE Recommended Practice J1962 ...beginning with model year 2003.

One of the Alliance member companies uses a manufacturer specific protocol for reprogramming rather than SAE J1962 and would not be able to comply with SAE

J1962 by the 2003 model year. This issue was brought to the attention of the SAE committee members who were developing SAE J2534, pass-through reprogramming. This issue was resolved by incorporating the manufacturer specific protocol into SAE J2534 which also references SAE J1962. This particular manufacturer plans to comply with SAE J1962 as it phases in CAN.

Since SAE J1962 is referenced in SAE J2534 and since the regulation requires manufacturers to comply with SAE J2534 by the 2003 model year, ***the SAE J1962 requirement should be deleted from the regulation.*** If EPA believes that it needs to reference SAE J1962 in its regulation, EPA should simply reference it without an implementation date.

20. <u>Website Reporting Criteria (Section (g)(17))</u>

Automakers believe that the detailed reporting provisions in the proposal should be eliminated and replaced with a general reporting requirement for an annual report on the performance of the website with a specified deadline. Any details of the annual reports should be addressed separately from the regulations in a manufacturer advisory letter in the same manner as has traditionally been done for the EPA vehicle emissions certification program. It is inappropriate to include such details in the regulations for several reasons.

First, given the rate of change in Internet activities, it is difficult to predict precisely the exact content of annual reports. Second, it is likely that the information content of annual reports may change over time, even annually. Therefore, placing such reporting details in the regulations would create a frequent need for EPA to revise the regulations. Having to deal with the regulatory process for such updates would be an administrative burden on the Agency, and it would take a lengthy period of time (sometimes two years or more) to revise the regulations.

For these reasons, we believe that specifying annual reporting details in manufacturer advisory letters is a better approach, because any needed annual changes can be easily effected without undue burden and administrative process. Thus, ***we recommend replacing the 17 reporting criteria from the regulation with a simple statement that manufacturers are required to report website performance.*** Again in line with the traditional EPA certification program, ***we recommend that EPA schedule a public workshop to discuss the details of annual website performance reports in advance of issuing the manufacturer advisory letter***. If EPA decides to do otherwise, we would be glad to discuss our specific concerns about the proposed reporting details at a later time.